Supreme Court, U.S.
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No. 92-1140

In The

Supreme Court of the United States

October Term, 1992

DONALD R. BROWNING and NANCY C. BROWNING,

Petitioners,

v.

BOATMEN'S BANK OF BENTON,

Respondent.

MICHAEL LEWIS BROWNING, individually and as trustee; BARBARA JANE WARD, and MARY SUSAN BENNETT,

Defendants

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On December 16, 1988, Boatmen's Bank of Benton ("the Bank") filed a complaint against Donald R. Browning, Nancy C. Browning, and their three adult children, Michael Lewis Browning, Barbara Jane Ward and Mary Susan Bennett ("the Brownings"). (R.13). The complaint sought a declaration setting aside certain fraudulent conveyances between the Brownings and their children. (R.13).

On November 14, 1989, the Brownings filed a Motion to Disqualify Attorney, asking that the Bank's attorney be disqualified from representing the Bank. (R.259). During the eleven-month period between the filing of the complaint and the filing of their Motion to Disqualify Attorneys, the Brownings filed a series of motions to dismiss the complaint, eight discovery depositions were taken, several memoranda of law were filed in opposition to the various motions to dismiss, discovery requests were filed and the Brownings sought and obtained a change of venue from a judge in the case. (R.79 through R.227).

In the Bank's response to the Motion to Disqualify Attorney, the Bank asserted, *inter alia*, that the Brownings had waived their right to request disqualification by failing to raise the issue in a timely manner during the course of the proceedings. (R.263).

On November 20, 1989, during oral arguments on the Motion to Disqualify Attorney, the Brownings asserted that they had not brought the issue of disqualification to the attention of the trial court earlier because they had just recently become aware of the alleged basis for disqualification. (R.771). According to the Brownings, this

new information was the fact that one of the Bank's attorneys had previously represented the Maurice Campbell estate in a probate matter. (R.771).

In response to this assertion, one of the attorneys for the Bank advised the trial court that Nancy Browning, one of the defendants, had made a complaint to the Attorney Registration and Disciplinary Commission against one of the Bank's attorneys shortly after this case was commenced in 1988. (R.786). Counsel for the Bank offered to provide the trial court with copies of letters sent to the Attorney Registration and Disciplinary Commission reflecting the Brownings' prior awareness of the facts on which they based their Motion to Disqualify. At that time, the following discussion took place in open court:

> MR. COX: Your Honor, if the court would like, I would provide the court a copy of the letter that Nancy Browning wrote to the Attorney Disciplinary Commission, last February, about this, and our response to that, if that would be of help to the court.
>
> THE COURT: I don't really think it would be. I am going to take that, that you did that, and the times that you have given me, as being so, rather than delaying this, any longer, unless counsel has some objection that that didn't happen.
>
> MR. SZCZEBLEWSKI: Judge, I am not aware of all that.
>
> THE COURT: Well, submit it then.
>
> MR. HART: Why don't you get him under oath?

> THE COURT: Why don't you go ahead and submit that then, if he is not familiar with it, and, that way, he will know what it is that was submitted. You can do that, say, by the –
>
> MR COX: I can do that today, if you would like.
>
> THE COURT: Why don't you submit those today, and I will give you seven days, if you want to respond just to that.
>
> MR. SZCZEBLEWSKI: Okay.
>
> THE COURT: Anything else?
>
> MR. COX: No, sir. Thank you.
>
> THE COURT: Okay. That will be all, on the record. Off the record. (R.820,821).

The documents discussed above were submitted to the trial court that day without any objection by the Brownings, who made no response whatsoever to those documents. On December 11, 1989, the trial court denied the Motion to Disqualify Attorney by docket entry. (R.4).

On January 2, 1990, the Brownings filed their Motion to Reconsider Motion to Disqualify Attorney. (R.337). On January 8, 1990, the trial court entered a written order denying the Motion to Disqualify. (R.397).

On February 7, 1990, the Brownings filed an Amended Motion to Reconsider Motion to Disqualify Attorney. (R.496). On February 23, 1990, following oral argument, the trial court, by docket entry, denied the Amended Motion to Reconsider Motion to Disqualify Attorney in all respects except as to an issue involving a prior title opinion; the trial court requested affidavits from the parties on this particular issue. (R.8). The trial

court ultimately denied the Brownings' Amended Motion to Reconsider on March 12, 1990. (R.9).

On April 6, 1990, the Brownings filed their Notice of Appeal from the January 8, 1990, order denying their Motion to Disqualify Attorney and from the order entered March 12, 1990, denying their Amended Motion to Reconsider Motion to Disqualify Attorney. (R.732). On February 3, 1992, the appellate court dismissed the appeal for lack of jurisdiction on the basis that orders denying motions to disqualify attorneys are not final and appealable. (A.3).

The Brownings sought leave to appeal to the Illinois Supreme Court, which was denied on June 3, 1992. (A.7). The Brownings then filed a motion asking the Illinois Supreme Court to reconsider its denial of leave to appeal, which motion was denied on July 7, 1992. (A.8).

On December 4, 1992, the Brownings filed their Petition for a Writ of Certiorari with the United States Supreme Court, expressly premising jurisdiction on 28 U.S.C. Section 1257.

SUMMARY OF ARGUMENT

The United States Supreme Court does not have jurisdiction under 28 U.S.C. Section 1257 over the issues raised by the Petitioners in this case. No final judgment or decree has been entered by the Illinois Supreme Court, the Illinois Appellate Court, or the Illinois trial court. The state courts of review have merely refused to exercise jurisdiction over an interlocutory appeal.

Orders denying a motion to disqualify an attorney are not final and appealable under either well-settled Illinois law or analogous federal law.

This case does not involve a properly raised federal question. Petitioners did not raise any federal question below, and the state courts did not rule on any federal question.

ARGUMENT

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO DECIDE PETITIONERS' CLAIMS

Petitioners purport to invoke jurisdiction under 28 U.S.C. Section 1257. There is no basis for jurisdiction under that section for two main reasons: (1) no final judgment or decree has been entered, and (2) no federal questions were raised or decided below.

The Illinois Courts, including the Illinois Supreme Court and the Illinois Appellate Court have not entered any final judgment or decree in this case. The reviewing Illinois courts have merely refused to hear an interlocutory appeal from the trial court's denial of Petitioners' Motion to Disqualify Attorney on the ground that such denial was not final and appealable, and therefore the reviewing courts lacked jurisdiction. (A.3). Illinois courts have consistently held that such orders are not final and appealable. *Almon v. American Carloading Corporation*, 380 Ill. 524, 44 N.E.2d 592 (1942); *Matsunaga v. Worrell*, 169 Ill. App. 3d 681, 523 N.E.2d 1042 (1st Dist. 1988); *Lieb v.*

Toulin, Inc., 113 Ill. App. 3d 707, 447 N.E.2d 900 (1st Dist. 1983), denying interlocutory appeal of an order refusing to disqualify attorney.

Petitioners argue that certain federal courts have, in the past, found orders regarding disqualification of an attorney to be final and appealable. (Petition at p.29). However, all of the cases cited by Petitioners on this point were decided prior to the decision of the United States Supreme Court in *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the United States Supreme Court held that a district court order denying a motion to disqualify an attorney in a civil case is not appealable as a final decision under 28 U.S.C. Section 1291. Later, in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), the United States Supreme Court again held that orders disqualifying counsel in civil cases are not immediately appealable. Neither of the foregoing opinions of the United States Supreme Court have been acknowledged or otherwise addressed by Petitioners.

Petitioners will have an opportunity to raise the disqualification issue on appeal to the state courts following the trial of this matter. However, under both well-settled Illinois law and analogous federal law, they have no recognized right to appeal this issue to the United States Supreme Court at this point in the state court litigation.

Further, the instant appeal does not involve a properly raised federal question. Petitioners have failed to specify in their Statement of the Case the stage in the proceedings at which federal questions may have been raised or the manner of raising them. Rule 14.1(h). Unless it appears in the Record that a federal question was

properly raised and decided in the state court below, the United States Supreme Court's appellate jurisdiction fails. *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969).

Petitioners purport to raise two federal questions for the first time in their Petition. First, Petitioners assert that they were somehow denied due process because the Illinois Appellate Court did not dismiss the appeal until it had been pending for nineteen months. (Petition at p.16). The Record reflects that this issue was not raised below. Petitioners cite no authority for the proposition that the timing of the Illinois Appellate Court's dismissal of their appeal for lack of jurisdiction somehow violated their right to due process. Next, Petitioners assert that neither the Illinois Appellate Court nor the Illinois Supreme Court ruled on the issue of the privacy of the Attorney Registration and Disciplinary Commission documents submitted to the trial court. (Petition at p.17). This issue was not ruled on by the state courts below because they recognized that they lacked jurisdiction to consider this question at this point in the proceedings. (A.3). Further, Petitioners completely failed to raise any issue involving their claimed constitutional right to privacy in the proceedings below. They will be given the opportunity to raise their constitutional claims at the appropriate time in the proceedings.

Even if the Petitioners had properly raised these issues below, the United States Supreme Court still has no jurisdiction because these issues have not been passed upon by the courts below. Both the Illinois Appellate Court and the Illinois Supreme Court declined to hear Petitioners' interlocutory appeal on the basis that they lacked jurisdiction because no final and appealable order

had been entered. Although the issues were found to be not yet ripe for appeal, Petitioners will have the opportunity to raise these issues for review at a later time, when a final and appealable order is entered.

As noted by this Court in *Webb. v. Webb*, 451 U.S. 493 (1981), there are strong policy considerations underlying the rule that federal questions raised in a state case be presented first to the state court. Principles of comity in our federal system require that the state courts be offered the opportunity to perform their duties. Also, this rule affords the parties the opportunity to develop the record necessary for adjudicating such issues. Finally, presentation of these questions to state courts may obviate the need for consideration of the case by the United States Supreme Court, thus reducing the workload of this Court.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the foregoing reasons.

Respectfully submitted,

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